Filed 4/5/16 P. v. Hayashi CA1/5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. STEVEN HAYASHI, Defendant and Appellant.	A142434 (Contra Costa County Super. Ct. No. 5-111059-2)

On July 22, 2010, Steven Hayashi's two-year-old stepgrandson, Jacob, was tragically killed after dogs owned by Steven attacked and mauled him.[1] Steven was convicted after a court trial of felony child endangerment (Pen. Code, § 273a, subd. (a)),[2] allowing a mischievous animal at large (§ 399, subd. (a)), and involuntary manslaughter (§ 192, subd. (b)). Imposition of sentence was suspended, and Steven was placed on probation for three years with various terms and conditions. On appeal, Steven challenges the legal standards employed by the trial court and contends insubstantial evidence supports the trial court's findings. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Steven was charged by information with felony child endangerment (§ 273a, subd. (a); count one), allowing a mischievous animal at large (§ 399, subd. (a);

[1] Given the family relationships and mutual surnames involved, we refer to members of the involved families by first name.

[2] Undesignated statutory references are to the Penal Code.

count two), and involuntary manslaughter (§ 192, subd. (b); count three). The information further alleged as an enhancement to count one that Steven willfully caused and permitted Jacob to suffer injuries resulting in death (former § 12022.95). Steven waived his right to trial by jury and the case was tried to the court.

A. *Prosecution Evidence*

In July 2010, Steven and his wife, Leticia, lived with their two sons, Craig (18) and C.H. (12), on Trailcreek Court in Concord. In April 2009, Leticia's adult son from a prior relationship, Michael, moved into the Hayashi's Antioch home with his two young sons—Jeremy and Jacob. The entire family moved to Concord in May 2009. Steven owned five "pit bull mix" dogs, three of which were routinely kept in the garage. In July 2010, Jacob was two years old and Jeremy was four years old.

1. *911 Call*

On July 22, 2010, at approximately 8:50 a.m., a 911 call was received from the Hayashi's Concord home requesting an ambulance for an injured child. Initially, the caller stated that the bleeding child had been bitten by a dog and that it "was fatal." Later, Leticia got on the line and told the dispatcher that she was awakened by dogs barking and had gone looking for her grandson. The boy was not breathing.

2. *Responding Officers' Testimony*

Concord Police Officer Jim Nielsen was the first officer to respond to the Hayashi home. When Nielsen arrived, Leticia and Craig were the only two adults in the house. Leticia was "[e]xtremely emotional, very upset, shaking, [and] crying. Just panicked." The child, Jacob, appeared dead. Leticia said she had been in her bedroom that morning when she heard screaming, awoke, and found Jacob's body in the garage. Leticia stated that she removed the child's body from the garage and carried him upstairs to the second floor where she began CPR. Leticia indicated that she and Craig cared for Jacob when

Jacob's father, Michael, was working.[3] She told the officer that Steven was playing tennis.

Concord Police Officer Linda DaMarco photographed the scene and looked for evidence. She described the scene in the house when she arrived at about 9:00 a.m. as "pretty chaotic." According to DaMarco and other officers, three dogs were in the garage barking, growling, and banging against the door between the garage and the laundry room. Two dogs were running back and forth in the backyard. All five dogs appeared to be pit bulls or pit bull mixes. The dogs in the backyard were also "keyed up," "agitated," "barking," and "snarling." When officers opened the door to try to gauge how much blood was in the garage, two or three dogs immediately moved towards the door "with purpose, like a prey drive." As the dogs launched themselves at an officer and the door, he had to hit the lead dog in the head in order to get his arm back inside and slam the door. "[M]ore snarling" and "more barking" was heard, as the dogs continued "launching themselves [at] the door and running around the garage."

Officers from Contra Costa County Animal Services came to remove the dogs. Sergeant Terry DeCosta stated that, given the circumstances, the two dogs in the backyard acted "fairly normal," but the dogs in the garage were barking, growling, and throwing themselves against the interior and exterior doors. When Animal Control Lieutenant Joseph DeCosta arrived, he could hear dogs hitting the exterior garage door with such force that he was afraid a patched portion of the garage door would give way.

The officers entered the backyard, snared the two dogs there, and secured them in Sergeant DeCosta's vehicle. While in the backyard, Sergeant DeCosta observed marks on the fence consistent with dogs having scratched, clawed, and rammed against it. She also noticed claw marks through the lower left corner of the patch on the exterior garage door.

[3] Despite Leticia's initial statement to Nielsen, it was undisputed at trial that Craig was not involved in caring for Jacob or Jeremy.

The animal control officers proceeded to an exterior pedestrian door to the garage. The dogs in the garage threw themselves with such force against the door that adjacent windows vibrated. For the first time in her 28-year career as an animal control officer, Sergeant DeCosta asked a colleague to draw a firearm. When the door was initially opened, one of the dogs bit an officer's finger. The door was closed and the dogs continued to bite at the door. In Sergeant DeCosta's opinion, these dogs were acting as a well-coordinated pack, which was something she had not previously experienced. The officers pepper sprayed the outside of the pedestrian door and opened it using a snare pole. The dogs continued to attack despite the pepper spray. The officers controlled one of the dogs using a catch pole, and thereafter used that dog to physically control another. The dogs began attacking each other. As the officers removed each dog, they used a catch pole to close the door because the remaining dogs "kept engaging" and did not accept the officers "as being more dominant." Sergeant DeCosta was scared because the dogs "were exhibiting such a good pack mentality . . . that if they did get somebody down on the ground or they did start attacking, [or] if all three of them were successful in exiting the garage . . . somebody was going to get seriously hurt."

Eventually, the officers captured and placed all three dogs from the garage, later identified as Sadie, Kiwi, and Jake, into Sergeant DeCosta's truck. Sergeant DeCosta noted that the dogs from the garage were bloody and had "fight wounds"—open lacerations where they had been bitten and had teeth raked across their skin. She also saw "ticking"—scarring and irregular coat growth—on all five dogs. The ticking was consistent with prior fights among the dogs, but not formal dog fighting. In Sergeant DeCosta's experience, most dogs kept as pets do not have such fight wounds.

Sergeant DeCosta noted that certain window screens, including the screen to the back sliding glass door, had tears and holes that were consistent with damage done by a dog. In a desk drawer next to identification documents belonging to Steven, Lieutenant DeCosta also found a dull knife with electrical tape on the handle inside a sheath. Based on his training and experience, Lieutenant DeCosta believed it was a "bite bar" or "bite stick," used to force a dog to release its jaws.

After the dogs' removal, Concord Police Corporal Joseph Higby photographed the home's interior, as well as the outside yards. The home had a laundry room with a door that opened into the garage. The door between the laundry room and garage could be locked by a mechanism in the doorknob and by a deadbolt. The lock in the doorknob was three feet above the floor, and the deadbolt was approximately three feet six inches above the floor.[4] Higby found only one child safety door lock—on the door leading to the downstairs bathroom. There were no safety locks on the exterior doors or the laundry room door that opened into the garage.

Inside the garage, near the main garage door, Higby found a boy's long-sleeved shirt with green buttons. The shirt was torn, stained red, and had hair on it. The officer found a soiled diaper in the middle of the garage. Closer to the large garage door were a pair of boy's pants with two puncture holes in them. Near the stairs that led from the laundry room to the garage was a portion of a human ear and a bone fragment. Higby also observed a large area of blood stain, with multiple swipe marks, and blood spatter reaching up to seven feet high on the walls.

DaMarco witnessed, and Sergeant DeCosta photographed, the killing and subsequent necropsies of the five dogs. The dogs inside the garage were assigned the numbers A618474, A618475, and A618476. A small amount of clothing and a green button were found inside the stomach of A618475, the female dog. Strands of black hair attached to a portion of scalp were found inside the stomach of A618476, a male dog. The other male dog, A618474, did not have any human hair, tissue, or clothing in its stomach.

3. *Autopsy*

The pathologist who conducted the autopsy on Jacob opined that the cause of death was skull fractures, torn blood vessels, and blood loss from "multiple canine bites." The pathologist observed that Jacob's facial skin and subcutaneous tissue had been torn off, exposing Jacob's right eye, and there were gnawing bite marks in the remaining

[4] Jacob was three feet two inches tall.

tissue of Jacob's face and skull. Puncture wounds in the back of Jacob's head penetrated his scalp and fractured his skull. Jacob also suffered at least 100 bite marks, including multiple deep puncture wounds and lacerations on both sides of his neck, both arms, his groin, and his chest, which severed major blood vessels and punctured his lungs. The puncture wounds were of varying depths—from approximately half an inch to two or three inches deep. Jacob's left arm had been ripped out of its socket. The pathologist believed Jacob had died within five minutes.

4. *Steven's Statements to Police*

Jacob was transported to John Muir Medical Center in Walnut Creek where he was ultimately pronounced dead. Concord Police Detective Greg Rodriguez interviewed Steven twice that day. Initially, Rodriguez met Steven outside the hospital. Steven explained he preferred to remain outside because his family was mad at him. Steven agreed to speak to Rodriguez as they sat on a bench outside the emergency room.[5] Steven told Rodriguez he adopted Sadie from a shelter approximately two-and-a-half years before. Unbeknownst to him, Sadie was pregnant when he adopted her. She had a litter shortly after arriving in the home. The Hayashis kept two of the five puppies, naming them Kiwi and Jake. About one year later, Sadie gave birth to another litter of puppies. The Hayashis again kept two puppies, naming them C.J. and Max. Steven said he and his youngest son, C.H., took care of the dogs.

Steven told Rodriguez that Jacob and Jeremy were kept away from all the dogs because Steven didn't trust the dogs with the younger children. The big male, Kiwi, was aggressive and particularly excited by the toddlers. Steven explained that Kiwi was excitable when he saw people. When people walked along the outside of the Hayashis' backyard fence, Kiwi tracked them, barked, and slammed his body against the fence. Steven additionally told Rodriguez that he believed Kiwi and the other dogs had killed

[5] Although Rodriguez already knew Jacob had died, he did not tell Steven about the child's death until nearly the end of the second interview. Rodriguez wanted to first obtain a thorough statement.

the family Chihuahua. Steven also believed the dogs had killed the family parrot. Steven told Rodriguez that he knew "[the] animals have aggressive tendencies towards people," and he knew "to keep them away from the kids. Small kids can get them excited."

Jacob was never introduced to any of the dogs face to face, but he had taken a specific interest in Kiwi in the past week or so. Kiwi had been barking very aggressively at Jacob through a sliding glass door. Steven said that once, as he held Jacob in his arms, Kiwi jumped up and took a nip at Jacob.

Steven said he woke early that morning and left the house at approximately 7:10 a.m. to play tennis with C.H. He described this as his "normal routine." He took care of the kids and fed the dogs when he returned home. Leticia worked late at night and often slept during the morning hours. On that particular morning, Max and C.J. were in the back yard, while Sadie, Kiwi and Jake were in the garage. Steven did not lock the deadbolt on the door between the laundry room and garage. He thought everyone in the house was asleep. Jacob and Jeremy did not normally go downstairs on their own, and Steven had never seen either child open the garage door.

Steven told Rodriguez the dogs ran in packs, so he kept them in two groups and rotated them between the garage and backyard to avoid dog fights. The older three dogs were usually together, and the younger two were in the other group. Rodriguez also testified that Steven said, numerous times, he kept the dogs away from everyone because he knew all of them could be aggressive and wanted to avoid anyone getting hurt. Steven said Leticia, Craig, and Michael had all asked him to get rid of the dogs because they did not feel safe.

Rodriguez also had a five- to 10-minute conversation with C.H., with Steven's permission. C.H. told Rodriguez that he watched Kiwi kill the family's Chihuahua. Specifically, C.H. saw Kiwi walk up to the Chihuahua and bite it. Sadie and Jake then joined in. C.H. also said he found the family's parrot dead in the backyard with the dogs.

Rodriguez told Steven that Michael was on his way to the hospital. Steven said he did not want to talk to Michael or anyone else in the family for fear they would blame him. Instead, Steven agreed to go to the police station. In a recorded interview at the

police station, which was played at trial, Steven largely confirmed what he told Rodriguez at the hospital. Kiwi was the most aggressive dog and had an eye irritation. However, Steven now said that he considered all of the other dogs to be "gentle" and good with people. Steven said he only kept Kiwi away from Jeremy and Jacob. When asked why the two children were not allowed around Kiwi, Steven said, "because Kiwi shows some aggressive tendencies toward the toddlers."

Steven kept the children away from Kiwi "[j]ust to be safe" because he did not "trust" Kiwi around the children and because of aggressive behavior Leticia had reported. When asked what sorts of behavior Leticia claimed to witness, Steven said she reported seeing Kiwi chasing people along the fence line behind the house. The only "aggressive" act Steven had personally witnessed was when, approximately one year before, Kiwi "nipped" at Jacob while Steven held the child in his arms. Kiwi made no actual contact. Steven also described how, in the days prior to the attack, Jacob would knock on the glass while Kiwi and the other dogs were outside and Kiwi would "bark." He never witnessed any of his dogs getting into fights with other dogs on the street, but Kiwi sometimes fought with his younger dogs—pinning them down. When asked by Rodriguez whether he had done any "bite work" with the dogs, Steven made clear he did not fight his dogs. C.H. regularly walked all the dogs except Kiwi. Steven did not trust Kiwi.

Steven acknowledged Jacob and Jeremy were capable of opening the inside garage door, but they had "never done it" and could not reach the dead bolt. When he left that morning, Steven did not lock the garage door. He thought everyone else was asleep. Jeremy and Jacob recently had been getting into bed with Leticia when they woke up. The boys had never come downstairs on their own. Steven added, "Usually before I take my son to school or take him to tennis in the morning, if I see them coming out, I always say go back in their room and they go back to their room and watch TV."

Steven acknowledged the death of the family's Chihuahua. One of the officers explained that C.H. said he watched Kiwi kill the dog. Steven estimated Kiwi and Jake were three or four months old at the time and "almost the same size as [the] Chihuahua." Rodriguez asked Steven about the death of the family's parrot and of another family dog,

an Akita. Steven said no one saw those incidents. The parrot was found dead in the backyard. With respect to the death of the Akita, Steven said that the dog had no visible blood or marks and believed that "he might have had a heart attack . . . ." Steven said, "we still don't really know what exactly happened."

When asked if he thought it was a good idea to have small children in the house with his five dogs, Steven replied that it was not because "things like this can happen." Steven had owned dogs since the age of 12, but he had only heard of similar attacks on television. He believed that a pit bull was "just like any other dog." Yet, he made a conscious effort to keep Jacob and Jeremy separated from Kiwi.

Steven admitted fault for Jacob's death and confirmed that every single family member, other than C.H., had asked him to get rid of Kiwi or all the dogs. Rodriguez asked whether it was "because they're aggressive or because they don't like them or because they're afraid of something like this happening?" Steven replied: "Probably both I guess."

5. *Leticia's Statements to Police*

Concord Police Detective Kristina Werk interviewed Leticia at John Muir Medical Center. The interview was not recorded. Although Werk was aware that Jacob had died, she did not inform Leticia. Nonetheless, Leticia was emotionally distraught—"crying," "wailing" and "nearly hysterical" at times. Leticia appeared to understand Werk's questions.

Leticia said she regularly worked the swing shift as a registered nurse. In July 2010, the household "routine" was for Steven to watch Jeremy and Jacob in the morning while she slept. Michael usually left their house for work at 5:30 a.m. Leticia described Steven as "very controlling." Leticia repeatedly said she knew "something like this would happen," and that she had told Steven "everyday" to get rid of the dogs.

On July 22, 2010, Leticia said she woke up to dogs barking. The dogs sounded "strange." She got up, called for Jeremy and Jacob, but only Jeremy came. She went downstairs and noticed the door to the garage was slightly ajar. She panicked, since that is where the dogs were usually kept. When she opened the door, she saw Jacob lying on

the ground with the dogs around him. Leticia fumbled for the light, then ran inside the garage, and picked Jacob up. She brought Jacob in to the house and began administering CPR.

At approximately 2:00 p.m. the same day, Werk conducted a recorded interview with Leticia at the Concord police station. The transcript was admitted at trial. During the recorded interview, Leticia confirmed her prior statements to Werk about the family routine, her requests to Steven to remove the dogs because she worried for the children's safety, and their attempts to keep the dogs away from Jacob and Jeremy. Leticia also explained that the biggest dog, Kiwi, was the only one that was "very aggressive." She said, "when he walks, the way he walks is like a king, very controlling . . . ." When Werk asked Leticia how many times she had talked with Steven about getting rid of the dogs, she replied, "It was almost every single day we were in argument . . . . Every time . . . they come home . . . from tennis, I told him [to get rid of the dogs]." Steven would respond, "Why don't you get rid of Michael's family?" Leticia said: "I'm worried because we have little ones. Not only that, um, problems like this would happen. I know it can happen because it's just a matter of time. But he doesn't look at it like that. He thinks that . . . everybody should take care of themselves . . . ." Leticia said that Jeremy and Jacob were able to open the inside garage door and that she had asked Steven many times to raise the locks on the door, but he refused. Michael had also asked Leticia, "Why doesn't [Steven] get rid of those stupid dogs?"

6. *Leticia's Testimony*

Leticia initially elected to exercise her Fifth Amendment privilege when called as a witness. However, after securing a grant of immunity, Leticia testified that, in July 2010, she did not typically arrive home from work until about 2:00 a.m. She normally woke up between 9:30 and 10:00 a.m. Contrary to her previous statements, Leticia indicated none of the dogs were aggressive and denied sharing any concerns about them with Steven. Leticia explained that her prior statements were unreliable because she was "hysterical" and "wasn't thinking right" at the time.

On cross-examination, Leticia said she watched Sadie kill the Chihuahua. Kiwi and Jake were still puppies and Sadie was still nursing. The dogs were loving and Kiwi was not aggressive at all. The only reason she wanted Steven to get rid of the dogs was because she did not like the mess they created. The living arrangement with Michael, Jacob, and Jeremy was intended to be temporary. Steven cared for the children at times, but there was no formal arrangement with Michael. Steven loved Jacob and Jeremy.

7. *Events of July 16, 2010*

Approximately one week prior to Jacob's death, Jacob was found alone near the intersection of Trailcreek Court and Concord Boulevard. A passerby saw Jacob, stopped his car, dialed 911, and stayed with the child until he was picked up by a man who identified himself as the child's grandfather.[6]

8. *The People's Expert Witness*[7]

The People's expert witness on dog behavior, Sapir Weiss, had 38 years of experience, including training police and protection dogs, and specializing in canine behavior disorders. Weiss opined that, "[i]f properly bred and properly socialized and properly handled and exercised, [the pit bull breed] is a lovely dog" and not aggressive by nature. However, improperly bred and improperly socialized pit bulls can be very dangerous because the breed has a strong predatory drive—the instinct to chase a moving object, catch it, and kill it.

Weiss believed Steven's dogs, and in particular Kiwi, were aggressive and not properly socialized.[8] Weiss relied on the following "red flags": (1) Kiwi's aggression toward other family pets; (2) Steven's hesitance to walk or socialize Kiwi;

---

[6] There was some conflict in the record regarding whether the child found was Jacob or Jeremy.

[7] The trial court ultimately concluded the expert testimony was of "limited value" because the standard for criminal negligence focuses on a reasonable lay person, rather than an expert.

[8] Weiss focused upon Kiwi, whom he described as "unsound" and the "largest and the most aggressive [dog.]"

(3) descriptions of Kiwi as "aggressive" and "dominant"; (4) family members' regularly voiced concerns regarding the dogs' aggression; (5) the existence of fight scars on all five pit bulls; (6) descriptions of the dogs, and particularly the large male dog, from police and animal control officers on the scene ; (7) isolation of the dogs for feeding, apparently due to food aggression ; (8) evidence the dogs clawed at and slammed into the fence when people walked by; (9) Kiwi's nip at Jacob while cradled in Steven's arms; and (10) the fact that, when Jacob walked by, Kiwi lunged at and barked at the sliding glass door.[9] The last category of evidence told Weiss "that the dogs were aggressive towards [Jacob] in particular" and perceived him as either a prey animal or a threat.

According to Weiss, pit bulls operating as a pack are even more dangerous. Weiss opined that the swipe marks in the blood, the blood spatter, and the varied strength of the bite marks on Jacob's body suggested that all three dogs in the garage fought over Jacob, dragging him and shaking him aggressively back and forth. He opined further that the "frenzy of the kill" continued when officers responded to the home, as the dogs showed a level of aggression that went beyond simply defending territory.

B. *Defense Evidence*

1. *Jacob's Mother's Testimony*

Jacob's and Jeremy's mother, Janet, testified for the defense. Originally, Michael lived with Janet, her mother, and the children. After Janet began working, she was not able to care for the children. Michael and the boys moved in with the Hayashis in Antioch.

Janet spent weekends in Antioch with the children and recalled the Hayashi family having large dogs. She and her mother originally expressed concern about the dogs being in the home with Jacob and Jeremy. Michael told her the dogs were "fine" and that Janet's mother "was worrying too much." When asked if she witnessed anything specific

[9] However, when asked to produce a report from his binder that indicated the dogs actually lunged at the glass door, Weiss was unable to do so. The only passage he could point to was the one, discussed above, in which Rodriguez paraphrased Steven's statement describing Kiwi as barking "very aggressively at Jacob through the glass."

about the dogs that caused her concern, Janet replied, "No. Just that they barked a lot and that was all."

In Concord, Janet indicated that the dogs came in the house "sometimes." She never saw any problems with the dogs and, after the family moved to Concord, she never expressed any further concern about the dogs. Janet testified there were times she, Jeremy, and Jacob went in the backyard with the dogs, but the dogs were never around the children unless an adult was also present. On one occasion, one of the dogs barked at Jeremy through the glass door. Janet was not concerned because Jeremy was holding food. She never witnessed the dogs lunging at the fence or behaving aggressively toward Jacob or anyone else. The last time Janet saw the children prior to Jacob's death was approximately January 2010.

2. *C.H.'s Testimony*

C.H., who was 16 years old at the time of trial, testified that he received Sadie as a gift from Steven when he was about 10 years old. C.H. and Steven assumed responsibility for caring for the dog. At that time, Sadie often stayed with C.H. in his room. Shortly after Sadie's arrival, she gave birth to a litter of puppies out of which they kept Kiwi and Jake.

After the family moved to Concord, Sadie had another litter and the family kept C.J. and Max. C.J. had difficulty chewing due to a jaw problem and, as a result, they isolated that dog when he ate. C.H. continued caring for the dogs after the family moved to Concord. All of the dogs, including Kiwi, were routinely walked.

The dogs got into fights with one another approximately once or twice per week, but C.H. always broke up the fights by telling the dogs to stop and pulling them apart. In his view, the dogs were just "playing." He did not regard it as a matter of concern or a safety issue. C.H. never saw any of the dogs throwing themselves at the back fence. They would just bark at people. C.H. never saw any of the dogs behave aggressively towards Jacob, Jeremy, or anyone else. C.H. used the knife found in the garage to "[p]ractice throwing knives." He never saw it used to open the dogs' jaws.

C.H. witnessed the attack upon the Chihuahua in the Antioch backyard. C.H. expressed uncertainty as to which dog began the attack. He believed it might have been Sadie, but acknowledged having previously told Rodriguez it was Kiwi. Jake and Kiwi were only about four or five months old, still nursing, and very small. C.H. could not remember if more than one of the dogs was involved.

The Akita lived with the Hayashis in Concord and was usually tied to a tree in front of the house. The Akita and the other dogs would bark and growl at one another, but he never witnessed fighting. The dogs were separated as a precaution. When the Akita was outside in front of the house, it clawed at the wood on the garage door and eventually tore a hole. C.H. did not see the Akita die, but caught a glimpse of the dog after it was dead. Its head was stuck inside the hole in the garage door. He did not see any blood or injuries. C.H. neither saw how the pet bird died, nor saw the bird's body after it died.

While the Hayashi family lived in Concord, Steven usually took care of Jacob and Jeremy. Leticia and Michael sometimes cared for the children. C.H. and his dad practiced tennis at about 7:00 a.m. "nearly every day." C.H. confirmed that, on the morning of the attack, he did not see the children before he and Steven left the house to go play tennis.

3. *Defense Expert's Testimony*

The defense expert on dog behavior, dog fighting, dog breeds, and dog and child safety, Jill Kessler-Miller, testified that many of the "red flags" identified by Weiss were not indicative of potential violence towards people. In her opinion, an expert often sees "red flags" that the average person does not. Conversely, regular dog owners often mistake certain dog behaviors, such as growling and "dominant" behavior, as portents of an aggressive incident, when they have other meanings.

Kessler-Miller said there is no statistical reason to believe that pit bulls are more prone to bite, but she also indicated she always recommends euthanasia for "bully breed" dogs that exhibit people-directed aggression. If she had been consulted in July 2010, she would not have recommended euthanasia, or removal from the home, for any of the

Hayashis' dogs because the dogs were not terrorizing the children, and there were no prior bites or animal control complaints.

Upon reviewing all of the history and materials related to the Hayashi family and their dogs, Kessler-Miller testified that even from the point of view of an expert, she could not say there were any "blatant" problems. A typical dog owner would not have been able to anticipate such an attack, knowing what the Hayashis knew, because there was no previous history of aggression between the dogs and humans. However, Kiwi's behavior at the sliding glass door would have been something to be concerned about if he was also barking aggressively at Jacob—i.e., in a low tone. With such behavior and a small toddler, "some people would become concerned. That would be perceived [to] be a threatening behavior." The nipping incident with Jacob was not a "red flag" because she believed, based on Steven's statement that "no teeth were involved," that the act demonstrated curiosity, not aggression. Kessler-Miller believed the dogs' "frenzied" behavior after the attack could be explained by the commotion of police and medical responders.

Based on the pattern of Jacob's wounds and the absence of evidence in Kiwi's stomach after the attack, Kessler-Miller concluded that only Jake and Sadie were involved in the attack on Jacob.

C. *Verdict and Sentence*

The trial court denied Steven's motion for a judgment of acquittal (§ 1118), and found him guilty on all counts. The court also found the enhancement allegation true. Steven filed a motion for new trial (§ 1181), which was denied at sentencing. The trial court suspended imposition of sentence and placed Steven on formal probation for three years with the condition, among others, that he serve 365 days in county jail. The court further ordered that Steven continue on bail pending appeal. Steven filed a timely notice of appeal.

II. DISCUSSION

On appeal, Steven primarily contends: (1) the trial court applied an incorrect formulation of the criminal negligence standard; (2) the trial court's causation findings

are unsupported by substantial evidence; and (3) the trial court erred in concluding Jacob was in Steven's "care or custody" at the time of his death. Steven's arguments do not have merit.

A. *Criminal Negligence*

Criminal negligence is a required element of all three counts of which Steven was convicted. (*People v. Butler* (2010) 187 Cal.App.4th 998, 1006–1007 [involuntary manslaughter]; CALCRIM No. 581; *People v. Valdez* (2002) 27 Cal.4th 778, 781, 784 [criminal negligence is appropriate standard for felony child abuse involving indirect infliction of harm]; *People v. Toney* (1999) 76 Cal.App.4th 618, 622 [felony child abuse "[c]ases involving 'indirect abuse' require a showing of criminal negligence"]; CALCRIM No. 821; *People v. Flores* (2013) 216 Cal.App.4th 251, 259 (*Flores*) ["section 399 requires criminal negligence"].) Steven contends that, in finding him guilty of all three counts and denying his motions for acquittal and a new trial, the trial court applied an incorrect and improperly subjective criminal negligence standard. He also challenges the trial court's application of the facts to the law and insists the evidence, when properly evaluated, was insufficient as a matter of law to establish criminal negligence. We are unpersuaded and agree with the People that no error has been shown.

To the extent we are asked to determine the applicable legal principles, Steven presents a question of law, which we review de novo. (*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 712 & fn. 4; *People v. Alvarez* (1996) 14 Cal.4th 155, 217–218, 221; *Brewer v. Murphy* (2008) 161 Cal.App.4th 928, 935.) Because we find no legal error we "review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578; see *Jackson v. Virginia* (1979) 443 U.S. 307, 318–319.)

"Although the appellate court must ensure the evidence is reasonable in nature, credible, and of solid value [citation], it must be ever cognizant that ' "it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or

falsity of the facts upon which a determination depends . . . .” ’ [Citations.] Thus, if the verdict is supported by substantial evidence, this court must accord due deference to the trier of fact and not substitute its evaluation of a witness’s credibility for that of the fact-finder.” (*People v. Barnes* (1986) 42 Cal.3d 284, 303–304.) “ ‘ “To warrant the rejection of the statements given by a witness who has been believed by the [trier of fact], there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions. [Citations.] Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends.” ’ ” (*Id.* at p. 306.)

1. *Background*

The trial court, in announcing its verdict, said in relevant part: “I want to try and keep clear in my analysis of the distinction between my factual findings as to the information known or believed to be true by [Steven] at the time of the child’s death in this case and distinguish that from application to the objective reasonable person standard, as required by case law. *In other words, I think what counts is what was known by* [*Steven*] *at the time and then analyze that objectively to see if it meets the relevant criteria.* [¶] . . . [¶] *I’m going to refer to the information that I believe . . . was known to* [*Steven*] *as of the date of the incident, or believed by him to be true. In other words, his subjective knowledge, in my view, is what’s important*. For example, just to illustrate the distinction, even if something was ultimately proven to be untrue *if* [*Steven*] *believed it to be true at the time of Jacob’s death then that affects the reasonableness of his conduct*. So I’m going with his actual subjective knowledge at this point.” (Italics added.)

With respect to the criminal negligence required to convict Steven of child endangerment, the court explained: “I have concluded . . . that it is an objective standard in all respects as articulated in [*People v. Valdez, supra,* 27 Cal.4th at pages 783–791], [*Flores, supra,* 216 Cal.App.4th at pages 259–260], [*People v. Butler, supra,* 187 Cal.App.4th at pages 1008–1009], and [*People v. Medlin* (2009) 178 Cal.App.4th

1092]. [¶] I find that [Steven's] decision to keep the dogs in the home constituted criminal negligence. It was more than just ordinary carelessness, inattention or mistake in judgment. [¶] I find [Steven] acted in a reckless way that was a gross departure from the way that ordinarily careful people would act under the same situation. Again, *taking the subjective information available to* [*Steven*] *and comparing it to an objective reasonable person standard, I find that a reasonable person would not permit the children to be exposed to that danger*. [¶] I find that [Steven] had actual knowledge of the risk to the children. *Even though it's not required, again it's an objective standard, in this case the evidence shows me that he actually knew about the danger*. Again, he was told on a daily basis by his wife the children were at risk from the dogs, as well as by Michael and [C.H.]. [¶] He knew the dogs posed a danger to toddlers if they were not kept separated. He knew that the toddlers were wandering out of their bedroom in the morning and going down the hallway to [Leticia's] bedroom. He knew that Jacob was curious about the dogs and wanted to get their attention. He knew that the toddlers could open the door to the garage. He left the children unattended, . . . as a practical matter [Leticia] being asleep, to go play tennis with [C.H.], and he left the garage door unlocked. [¶] *My view is that any ordinarily careful person, knowing all these facts, would not permit the children to be left in this situation*." (Italics added.)

2. *Analysis*

Steven maintains the trial court applied a criminal negligence standard that was improperly subjective. We agree that criminal negligence *is* judged by an objective standard. Our Supreme Court has explained: "Criminal negligence is ' "aggravated, culpable, gross, or reckless . . . *conduct* . . . [that is] such a departure from what would be the *conduct* of an ordinarily prudent or careful [person] under the same circumstances as to be incompatible with a proper regard for human life . . . ." ' [Citation.] 'Under the criminal negligence standard, knowledge of the risk is determined by an objective test: "[I]f a reasonable person *in defendant's position* would have been aware of the risk [his conduct] involved, then defendant is presumed to have had such an awareness." ' " (*People v. Valdez, supra,* 27 Cal.4th at p. 783, italics added; accord, *Williams v. Garcetti*

(1993) 5 Cal.4th 561, 574; *Walker v. Superior Court* (1988) 47 Cal.3d 112, 136–137; *Flores, supra*, 216 Cal.App.4th at p. 259.) Thus, "[c]riminal negligence may be found even when a defendant acts with a sincere good faith belief that his or her actions pose no risk. As long as the trier of fact determines that the defendant was *unreasonable* in that belief, the defendant's actual subjective belief is irrelevant." (*People v. Rippberger* (1991) 231 Cal.App.3d 1667, 1682; accord, *Flores*, at p. 259.)

However, the objective standard of criminal negligence means only that a defendant's subjective belief that his or her acts are not dangerous is irrelevant, if a reasonable person would believe otherwise. No authority validates the converse proposition—that *only* constructive knowledge of risk will satisfy the criminal negligence standard. In the People's words, "no case holds that if the evidence shows the defendant knew the risks involved in a certain act or actions, and nonetheless proceeded to so act, that this evidence cannot help prove criminal negligence." In fact, the authority is to the contrary. (*People v. Ochoa* (1993) 6 Cal.4th 1199; *Williams v. Garcetti*, *supra*, 5 Cal.4th at p. 574 ["there can be no criminal negligence without *actual or* constructive knowledge of the risk" (italics added)].) This rule makes sense. A defendant's subjective awareness of the risk—as the trial court found here—makes the defendant more culpable, not less culpable. (See *People v. Valdez, supra*, 27 Cal.4th at pp. 787–788, 790–791.)

In *People v. Ochoa*, *supra*, 6 Cal.4th 1199, our Supreme Court rejected an argument quite similar to that raised by Steven. On appeal from his conviction for gross vehicular manslaughter while intoxicated and hit-and-run driving, the defendant challenged admission of his prior conviction for driving under the influence of alcohol, as well as evidence of his subsequent probation and attendance at an alcohol awareness class in traffic school. (*Id.* at pp. 1202, 1204–1205.) The defendant argued that "because the test of gross negligence is an *objective* one, i.e., whether a reasonable person in the defendant's position would have been aware of the risks [citation], evidence of his own subjective state of mind was irrelevant and unduly prejudicial." (*Id.* at p. 1205.) The court disagreed. "In determining whether a reasonable person *in defendant's position* would have been aware of the risks, the jury should be given relevant facts as to what

defendant knew, including his actual awareness of those risks. True, as the majority [on the Court of Appeal] observed, the defendant's *lack* of such awareness would not preclude a finding of gross negligence if a reasonable person would have been so aware. But the converse proposition does not logically follow, for if the evidence showed that defendant *actually appreciated the risks* involved in a given enterprise, *and nonetheless proceeded* with it, a finding of gross negligence (as opposed to simple negligence) would be appropriate whether or not a reasonable person in defendant's position would have recognized the risk. [¶] [A]lthough the test for gross negligence was an objective one, '[t]he jury should . . . consider all relevant circumstances . . . *to determine if the defendant acted with a conscious disregard of the consequences rather than with mere inadvertence*.' " (*Ibid.*)

Under *People v. Ochoa*, the standard of care remains objective. The question is what would a reasonable and prudent person do under the circumstances? However, the circumstances to be considered by the fact finder include the defendant's subjective awareness of the risks. The fact finder's consideration of subjective state of mind evidence does not alter the objective standard used to convict. (*People v. Givan* (2015) 233 Cal.App.4th 335, 347.)

Steven misplaces his reliance on *In re Maria R.* (1976) 64 Cal.App.3d 731, in which a violation of section 273a was unsupported by the evidence. (*Id.* at pp. 734–736.) The reviewing court explained: "The record shows no more than that a 16-year-old girl, acting on the advice of her mother, *ignorantly* gave to her baby too much aspirin too often and that she *ignorantly* provided food which the diagnosing doctor regarded as nutritionally insufficient. The expert testimony was clear that the effect of the combined dosage and diet would not become evident until after a substantial period of time; it is admitted that, as soon as the baby exhibited signs of illness, [the girl] and her mother sought medical advice and treatment. [¶] . . . [¶] . . . Nothing in the record before us shows that [the girl's] treatment of [her baby] was of such a kind that 'even the most ignorant and insensitive parent should recognize as hazardous to children.' At most, it

shows only that [the girl] was ignorant of the potentially adverse effects of administering aspirin to a small child." (*Id.* at pp. 734–735, italics added.)

Maria R. merely holds that a person with *neither actual nor constructive knowledge* of the risk can be criminally negligent. Steven has not demonstrated any error in the trial court's formulation of the criminal negligence standard.

Steven's real quarrel is with the trial court's findings of fact. He maintains that the trial court "misread the law by imputing to [him] knowledge and beliefs that he did not actually and subjectively harbor and [that] were unreasonable based upon the facts of the case. In order to attribute such beliefs to [Steven] those beliefs must, at a minimum, have some basis in objective reality." First, we disagree that the People had to show Steven's actual, subjective knowledge. Steven's culpability is based on his failure to act as a reasonable person would have acted in the same circumstances, which is necessarily predicated on what a reasonable person would have known and understood, not only on what Steven actually knew and understood. Second, the trial court found that Steven had subjective, actual awareness of the risk to Jacob. To the extent the trial court held the prosecution to a higher standard, Steven certainly cannot complain. The trial court's findings are supported by substantial evidence.

Steven specifically takes issue with several of the court's findings regarding his state of mind in July 2010 and seeks to have us to reweigh the evidence. He asks: "Should the trier of fact assume defendant knows facts that he denies knowing? Should the trier of fact impute knowledge to the defendant of which he . . . was subjectively ignorant? Is it permissible to hold the defendant accountable for subjective beliefs that are factually false?" In some instances, Steven suggests the trial court should have been limited to considering only his direct statements to the police about his subjective knowledge. That is simply not the law. (*People v. Bloom* (1989) 48 Cal.3d 1194, 1208 ["[e]vidence of a defendant's state of mind is almost inevitably circumstantial, but circumstantial evidence is as sufficient as direct evidence to support a conviction"]; *County of Kern v. Jadwin* (2011) 197 Cal.App.4th 65, 72–73 [substantial evidence

includes not only direct evidence, but also circumstantial or indirect evidence and all reasonable inferences flowing therefrom].)

First, he maintains there is only insubstantial evidence to support the trial court's finding that Steven "believed and was informed that the family's pet Chihuahua was killed by the three dogs, Sadie, Kiwi and Jake." But Rodriguez testified to Steven's statement at the hospital that he believed Kiwi and the other dogs had killed the family Chihuahua. C.H. also told Rodriguez that he watched Kiwi kill the family's Chihuahua. Specifically, C.H. saw Kiwi walk up to the Chihuahua and bite it, with Sadie and Jake then joining in. Steven, during his recorded interview, may have quibbled about which dog initiated the attack or whether Kiwi would have been able to kill the Chihuahua alone, but that does not mean the trial court could not reasonably infer that Steven believed all three dogs were involved.

There is also substantial evidence to support the trial court's finding that Steven was aware of other family members' safety warnings about the dogs. Leticia told Werk that she asked Steven, on a daily basis, to get rid of the dogs. And contrary to Steven's assertion, the requests were not undisputedly about Leticia's distaste for the dogs. Leticia said she warned Steven and that she knew "something like this would happen." Leticia also told Werk during her recorded interview that she had expressed her worry for the children's safety to Steven. And Steven told Rodriguez at the hospital that his wife, Craig, and Michael had all asked him to get rid of the dogs because they did not feel safe. During his recorded interview, Rodriguez asked Steven whether Michael, Leticia, and Craig had asked him to get rid of the dogs "because they're aggressive or because they don't like them or because they're afraid of something like this happening?" Steven replied: "Probably both I guess." The trial court did not have to believe Leticia's testimony at trial that she never expressed worry for the children's safety. The trial court specifically found Steven's and Leticia's statements on the day of the attack to be credible, while Leticia's trial testimony was lacking. We are powerless to second guess that credibility determination.

Substantial evidence supports the finding Steven was aware Kiwi "was excited by the toddlers and behaved aggressively towards them." Nor is it true "[t]he family members' warnings had no basis in reality" because "the dogs had no history of violence toward people—either children or adults." Steven asserts there is no evidence of any acts of actual aggression by the dogs directed at the children or other people and that, at most, he knew the dogs were aggressive with each other. Although we disagree that only human aggression is relevant to the risk calculus (see *Flores, supra,* 216 Cal.App.4th at p. 260), substantial evidence shows Kiwi was aggressive towards people, especially Jacob. Once, when Jacob was held in Steven's arms, Kiwi jumped up and nipped at him. Steven also reported to Rodriguez that Kiwi had been barking very aggressively at Jacob through the sliding glass door.[10] The trial court was not under any obligation to believe Steven's, or Kessler-Miller's, attempts to minimize the behavior.

There is also substantial evidence to support the trial court's finding that Kiwi was not walked because Steven did not trust him. This finding came straight from Steven's recorded interview with Rodriguez. Steven did not indicate that he did not know whether C.H. walked Kiwi. The trial court did not "impute false knowledge" to Steven. It had no obligation to believe C.H.'s conflicting testimony that he *did* walk Kiwi.

Steven appears to believe he necessarily exercised ordinary care because there was no evidence before July 22, 2010, that any of his dogs had succeeded in biting a person. We know of no authority suggesting, as Steven asserts, that the People could not show him to have been criminally negligent without his dogs having previously injured another

---

[10] Steven attempts to discredit Rodriguez's report of Steven's statements at the hospital, pointing out contradictions with the recorded interview and that Rodriguez did not write actual quotes in his report. Specifically, Steven asserts, "[i]f Steven had truly described Kiwi's barking at Jacob as 'very aggressive' in the first interview, it is likely that he would have done so again or, at least, that Detective Rodriguez would have used the word 'aggressive' when questioning Steven." Rodriguez testified that it was his intention during the second interview to "confirm" the answers that Steven gave him during the hospital interview. We agree with the People that we are bound by the trial court's rejection of Steven's argument. The trial court specifically found the testimony of the law enforcement officers credible.

human being. *People v. Berry* (1991) 1 Cal.App.4th 778, 786 and *Flores, supra,* 216 Cal.App.4th at page 260 do not suggest any such rule, as in both cases the owner of a dog was found criminally negligent without any prior injury to a human being.

In *Flores, supra,* 216 Cal.App.4th at pages 253–254, a dog named Blue escaped his chain in the defendant's front yard and attacked an elderly man. Blue had an extensive history of unprovoked aggression. On two occasions, Blue had charged other dogs and their owners. In another instance, Blue bolted out of the defendant's home, dented a neighbor's metal screen door, and caused the neighbor and her child to seek cover. (*Id*. at pp. 255–257, 260.) The county had, in fact, designated Blue as a "potentially dangerous" animal. In doing so, the county expressly advised the defendant that " '[a] potentially dangerous animal, while on the owner's premises, shall, at all times, be kept indoors, or in a secure enclosure.' " (*Id.* at pp. 256–257, italics & fn. omitted.) On appeal from the defendant's conviction for allowing a mischievous animal at large, the reviewing court concluded: "[G]iven Blue's prior history—*his demonstrated viciousness in attacking other dogs, unprovoked*; *his attempted unprovoked attack* on [a neighbor] and her family and friends, together with defendant's inability to overcome his dog's strength, even on a leash—leaving Blue chained up, close to a public sidewalk in a residential neighborhood, unattended in an unenclosed area, constitutes substantial evidence to support the jury's finding that defendant failed to act as a reasonably careful person would in the same situation." (*Id.* at p. 261, italics added.)

We agree with the *Flores* court that a dog's success (or lack thereof) in previously biting a person is not determinative. "Rather, the issue is whether it was reasonable for defendant, knowing [the dog's] propensities, to have kept [the dog] in the manner that he did." (*Flores, supra,* 216 Cal.App.4th at pp. 259–260.)

Despite Steven's insistence to the contrary, this case is actually remarkably similar to *Flores,* except that the risk was inside the home rather than to the public. Reviewing the evidence here in the light most favorable to the judgment, we conclude that there was substantial evidence to support the trial court's finding that Steven did not act as an ordinarily prudent person would have in his position. On July 22, 2010, Steven left the

home with three dogs, including Kiwi, in the unlocked garage. Steven told Rodriguez, on the day of the attack, that Jacob and Jeremy were kept away from all the dogs because Steven didn't trust the dogs with the younger children and knew they had aggressive tendencies toward people and other animals. Steven told Rodriguez that he knew he needed to keep *all* of the dogs away from the toddlers. Steven knew about Kiwi's problematic behaviors, that the dogs ran in packs, and that Kiwi, Sadie, and Jake attacked the Chihuahua. Thus, there was substantial evidence to support the trial court's finding that Steven had subjective knowledge *all* of his dogs posed a risk to the children. Knowing this, and that Jacob and Jeremy were regularly rising before 9:00 a.m. and could open the garage door, Steven nonetheless left the house with the dogs in an unsecured garage and the children unattended. Steven's conduct was such a departure from what the conduct of an ordinarily prudent or careful person would be under the same circumstances as to show a disregard for human life. The trial court's criminal negligence finding is supported by substantial evidence.

Finally, Steven argues that the court failed to consider the bonding experience he and C.H. shared in caring for the dogs, his fear that the dogs would be euthanized if taken to a shelter, and the allegedly temporary arrangements Michael and his sons had established in the Hayashi home. The trial court's criminal negligence finding is not abrogated by any of the "human and emotional factors" Steven identifies. (See *People v. Valdez, supra,* 27 Cal.4th at p. 791.) The trial court did not apply an incorrect legal standard or make findings unsupported by substantial evidence.[11]

[11] We do not separately consider any argument that the trial court erred in denying Steven's section 1118 motion or that the trial court failed to find that Steven subjectively knew his dogs were dangerous. (See *People v. Ceja* (1988) 205 Cal.App.3d 1296, 1301 [ruling on § 1118 motion reviewed for sufficiency of evidence at time motion made]; CALCRIM No. 2950.) The trial court clearly found Steven had actual knowledge in July 2010 that his dogs had aggressive propensities. The finding is supported by substantial evidence.

B. *Causation*

Steven also maintains the People failed to demonstrate a causal nexus between his negligent act and the resultant harm. Specifically, Steven suggests there is no causal nexus because only one dog was aggressive or "unsound"—Kiwi—and Kiwi was not involved in the attack on Jacob. Steven asserts, "The court's decision to hold [Steven] criminally negligent for keeping Sadie, Jake, Max, or CJ is in direct contravention of its intention to evaluate [Steven's] actions based upon what he believed." Because Steven only subjectively believed that Kiwi was potentially dangerous, not the other dogs, the People had to "prove beyond a reasonable doubt that Kiwi took part in the attack." This is nothing more than a reassertion of the previous argument we have already rejected—that only insubstantial evidence supports the trial court's finding Steven knew all his dogs were dangerous.

We note: "The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence. [Citation.] ' "Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one which suggests guilt and the other innocence [citations], it is the jury, not the appellate court[,] which must be convinced of the defendant's guilt beyond a reasonable doubt. ' "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment." ' " ' " (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

In order to convict Steven on all three counts and the enhancement, the People had to show that Steven's criminally negligent acts caused Jacob's death. (CALCRIM Nos. 581, 821, 2950; former § 12022.95; *People v. Butler, supra*, 187 Cal.App.4th at p. 1009.) For instance, to convict a defendant of involuntary manslaughter, " 'the state must do more than establish mere coincidence between [a criminally negligent] act and the fact of death. It must establish the "causal connection" between the [negligent act] and the loss of life.' " (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 591.) The defendant's criminal negligence must be the proximate cause of death. (*People v. Rodriguez* (1960)

186 Cal.App.2d 433, 440.) "[P]roximate causation requires that the death was a reasonably foreseeable, natural and probable consequence of the defendant's act, rather than a remote consequence that is so insignificant or theoretical that it cannot properly be regarded as a substantial factor in bringing about the death. [Citations.] Whether the defendant's conduct was a proximate, rather than remote, cause of death is ordinarily a factual question for the [trier of fact] unless ' "undisputed evidence . . . reveal[s] a cause so remote that . . . no rational trier of fact could find the needed nexus." ' [Citation.] A . . . finding of proximate causation will be not disturbed on appeal if there is 'evidence from which it may be reasonably inferred that [the defendant's] act was a substantial factor in producing' the death." (*Butler*, at pp. 1009–1010.)

According to Steven, "[t]he unprecedented attack carried out by two dogs believed to be innocuous by all family members was an unforeseeable intervening cause that broke the chain of causation." He begins by misframing the negligent act. He urges, "the court's postulation that there is a substantial danger inherent in the mere decision to keep dogs and children in the same house goes against the everyday experience of millions of households. A 'reasonable person' would not believe that simply keeping multiple dogs in the home with children would give rise to a great likelihood of harm, especially when there were clear measures in place (although sadly inadequate) to keep the dogs and children segregated from each [other.]"

The trial court made clear that Steven's negligent act was not, as Steven phrases it, "the mere decision to keep dogs and children in the same house." In announcing its verdict, the trial court explained: "[I]t was the unsupervised contact with the dogs that was the problem. *Not allowing the dogs with adult supervision*[.] [T]he dogs, other than Kiwi, could be in the presence of the younger children, but *to have . . . one of the children alone with* [*these*] *three dogs is the danger that was foreseeable*." (Italics added.) Again, the court observed: "I find that leaving the dogs in the household *and* leaving the children unsupervised in the morning did not constitute ordinary care of the animals." (Italics added.) The trial court continued: "[A]s to the risk factor, the defense argues that the combination of events that led up to this tragedy could not have been foreseen, and

the likelihood of each of them happening in combination was remote. I don't agree that that's the correct analytical approach, however. The question is not whether [Steven] knew the precise mechanism by which the dogs were likely to harm the children. The question is whether the risk that the children would be harmed was high. And for the reasons I have stated I believe it was. [¶] The danger posed by the dogs being in the same household as the children, the interest that Jacob was showing toward the dogs, the knowledge that Kiwi in particular had to be kept away from Jacob and Jeremy, the natural curiosity that Jacob showed, Jacob's ability to open the garage door, and then with that combination, leaving the children unsupervised with the knowledge that toddlers—the toddlers were getting out of bed and leaving their room, [*Steven*] *leaving them unsupervised and leaving the garage door unlocked, in my view, made the risk of harm very high*." (Italics added.)

The trial court also responded persuasively to the specific argument Steven continues to press on appeal. It explained: "Defense argues that the conduct [Steven] engaged in was not shown to be the causal factor in the child's death because . . . Sadie and Jake were the two dogs who mauled Jacob, and Kiwi, the dog about whom everyone was most concerned, did not particip[ate] in the attack . . . . [¶] First, I disagree that the risk of harm is parsed out that way. *The risk of harm was from all the dogs*. It was the three dogs who killed the Chihuahua together. It was the decision to keep all the dogs in the house with the children that posed the risk for the children. Any of these three dogs could have been the one to impose the fatal bite on the child. But the point is the exposing of all the dogs, not just the particular dog. [¶] *So it was the potential unsupervised contact with multiple dogs that posed the danger, in my view*. The defendant need not anticipate which of the five dogs was the one that was going to actually kill the child." (Italics added.)

We have already determined that the trial court's finding that the above conduct was criminally negligent is supported by substantial evidence. And there is ample evidence that Jacob's death was a reasonably foreseeable, natural and probable consequence of Steven's negligent conduct, as defined by the trial court. In any event,

the trial court also went on to observe: "[M]y conclusion is that all three dogs in the garage, Sadie, Kiwi[,] and Jake, participated in the attack on Jacob. I say that because of the consistently coordinated attacks on the law enforcement officers. And I think it's simply not credible that Kiwi stood by watching Jake and Sadie maul Jacob to death."

This finding is also supported by substantial evidence. It is not determinative that only Jake and Sadie were found to have blood on their faces and remnants from the attack in their stomachs. In fact, there was other evidence from which the trial court could reasonably infer that all three dogs were involved in the attack on Jacob. The People's expert witness opined that the swipe marks in the blood, the blood spatter to a height of seven feet on the cabinets and walls, and the varied strength of the bite marks on Jacob's body suggested that all three dogs in the garage fought over Jacob, dragging him and shaking him aggressively back and forth. When animal control and police officers responded to the scene, it was evident that all three dogs in the garage were acting as a well-coordinated team. Given this evidence and the evidence of Kiwi's aggressive tendencies, which the trial court found compelling, it strains credulity to suggest Sadie and Jake would viciously maul Jacob, while Kiwi merely sat by. Substantial evidence supports the trial court's finding that Kiwi participated in the attack.

C. *"Care or Custody"*

Finally, Steven challenges the trial court's finding that Jacob was in Steven's "care or custody" at the time of his death. In order to prove Steven guilty of child endangerment, the People had the burden to show Steven had "care or custody" of Jacob. (§ 273a, subd. (a); CALCRIM No. 821.)

In announcing its verdict, the trial court stated: "[Steven and Leticia] had invited, or at least permitted, [Michael] and the two boys to move in with them, and by the point of this attack they had been there for 14 months. So any suggestion that this might be temporary was long gone. So it's clear that they had two very young children living in their home and they had assumed at least substantial duties in supervising the children when Michael wasn't home. And any adult in a house with young children, in my view, has some responsibility for their safety. [¶] Now, the family's routine when Michael went

to work in the morning, as he had done most of the days of the two weeks preceding the death, was that [Steven and Leticia] were both responsible, in my view, for the children, because they were the only responsible adults in the home. [¶] So my conclusion is that [Steven], having taken these children into his home, and having agreed to supervise them in the morning, did assume the duties of a parent or a caregiver of the children in his home."

"The terms 'care or custody' do not imply a familial relationship but only a willingness to assume duties correspondent to the role of a caregiver." (*People v. Cochran* (1998) 62 Cal.App.4th 826, 832.) No affirmative expression of intent to undertake such duties is necessary. (*People v. Perez* (2008) 164 Cal.App.4th 1462, 1476 (*Perez*).) Care or custody may be established by a defendant's conduct and the circumstances of his or her interaction with the child. (*Ibid.*) "The language of the statute clearly covers not only parents, guardians, and babysitters, but also individuals who do not necessarily have as substantial a relationship to a child as a parent, guardian, and/or babysitter, but who nevertheless *have been* entrusted with the care of a child, even for a relatively short period of time." (*Id.* at p. 1469, italics added.) "[T]he relevant question in a situation involving an individual who does not otherwise have a duty imposed by law or formalized agreement to care for a child (as in the case of parents or babysitters), is whether the individual in question can be found to have undertaken the attendant responsibilities at all." (*Id.* at p. 1476.)

Steven concedes that he "willingly assumed the responsibility of feeding and supervising the kids at certain times of the day on a regular basis." However, he maintains that the People had the burden to show Jacob died during one of those periods of time. He also points out that both Leticia and Craig were home at the time of the attack and that the People did not produce evidence to establish Michael's whereabouts on July 22, 2010, and claims, "[t]his evidentiary omission alone vitiates the argument that [Steven] had care and custody for Jacob that morning." Essentially, Steven asserts that the People had the burden to prove Jacob died during a period of time when he was *not* in the care or custody of one of the other adults in the house—either Michael, Leticia, or

Craig. The trial court properly rejected Steven's premise that only one adult could have care and custody of Jacob at any given time.

In *Perez, supra*, 164 Cal.App.4th 1462, the defendant was convicted of child endangerment after police found unsecured heroin and syringes within the home of his sister, Delgado, where the defendant lived. Delgado's daughter also lived in the home. Delgado's four-year-old granddaughter stayed in the home on occasion. (*Id.* at pp. 1465–1474.) The record was deemed sufficient to support a finding the defendant had "care or custody" of Delgado's four-year-old granddaughter. (*Id.* at p. 1471.) The court explained: "The record demonstrates that Perez was much more than an acquaintance who had only minimal contact with [the four-year-old child] in the home every now and then, as he suggests. Although the adult family members who testified on Perez's behalf attempted to disclaim any notion that Perez ever babysat for [the child] or cared for her while she was in the home, there was a variety of evidence from which the jury could have concluded that this testimony did not tell the whole story. [The child] herself testified that she called Perez 'Daddy Joe,' that she ate meals with him, that she spent 'a little bit' of time with him, that he was at home 'every time [she was] at [her] grandma's house,' both 'all day long' and 'all night long,' and that Perez had babysat her '[o]ne day.' There was also testimony that Perez did not have a job and that he stayed at the house most of the time. This evidence, combined with evidence that [the child's] mother worked during the day and that her grandmother slept during the day, permits the reasonable inference that there were times when Perez was the only adult in the house who was not asleep while [the child] was present in the home, and thus, that [the child] was left in his care on such occasions. Despite the lack of direct evidence of any express agreement between [the child's] main caretakers and Perez that he would take care of [the child], there was substantial evidence that the nature of his relationship with [the child] during her regular visits to the home Perez shared with [the child's] mother and grandmother created a situation in which Perez was, as a matter of fact, 'caring' for [the child]." (*Ibid.*)

The court acknowledged that the child's mother and grandmother "may have been [her] presumptive caregivers," but did not find this dispositive. (*Perez, supra,* 164 Cal.App.4th at p. 1472.) The court explained: "The language of the statute does not suggest that only one person at a time can have the care or custody of a child. It would be illogical to presume that a child who lives in a home with two adults, one of whom has primary child care duties, would not be protected from the actions of the other adult under this statute. The more reasonable reading is that the statute is intended to prevent *all adults* in such a situation from placing the child in a situation in which the child's welfare is endangered. There was sufficient evidence from which the jury could have concluded that Perez *was one of several adults* in the home who had the care or custody of [the child], even if the evidence does not suggest that Perez was [the child's] primary caregiver." (*Ibid.,* italics added.)

In *People v. Toney, supra,* 76 Cal.App.4th 618, the defendant was convicted of, among other things, felony child abuse (§ 273a, subd. (a)) after a search of his home revealed he was making methamphetamine and had left dangerous chemicals within a child's reach. The defendant's wife, Judith, had a six-year-old son, Morgan, from a previous relationship who visited the home on weekends. (*Id.* at pp. 620–621.) On appeal, the defendant challenged the sufficiency of the evidence supporting his conviction. (*Id.* at p. 620.) The reviewing court rejected the defendant's contention that "care or custody" had not been established because there was no direct evidence that he voluntarily assumed a caregiver role or even that he resided with his stepson. (*Id.* at pp. 621–622.) The court found the evidence in the record—the existence of a child's paperwork in the living room, as well as a "lived in" child's bedroom—sufficient to establish "care or custody." (*Id.* at pp. 621–622.) The court reasoned: "[The defendant] had married Judith, who moved into his home. He also invited Morgan into his home, gave him a room of his own and allowed him to use an area in the living room where the child's paperwork was found. This evidence is sufficient to demonstrate [the defendant's] willingness to assume the care or custody of Morgan." (*Id.* at p. 622.)

Here, just as in *People v. Toney*, Steven permitted Jeremy and Jacob to live in his home. Just as in *Perez*, there was evidence that Steven was one of several adults in the home who cared for Jacob.[12] Steven may not have been the "primary caregiver," but there is substantial evidence that he routinely cared for Jacob and Jeremy. In fact, Michael usually left early in the morning for work; Leticia routinely slept until midmorning; and Steven was the only responsible adult who did not work outside the home. We reject the proposition that, for the purposes of section 273a, someone who routinely cares for a child relinquishes "care or custody" by leaving the child unsupervised with a hazard. Such a rule would be incompatible with the legislative purpose of section 273a, which was enacted to protect those who need special protection because of age and vulnerability. (*People v. Cochran*, *supra*, 62 Cal.App.4th at p. 832.) Substantial evidence supports the trial court's "care or custody" finding.

III. DISPOSITION

The judgment is affirmed.

[12] In his opening brief, Steven fails to cite *Perez.* In his reply brief, apparently recognizing that the *Perez* court's reasoning is fatal to his claim, Steven contends: "To the extent that *Perez* stands for the proposition that care or custody is some sort of immutable characteristic, it should only be applied to individuals who engage in illegal and obviously dangerous activities with knowledge that children are present in the household." Steven's argument is merely an attempt to rehash his criminal negligence argument, which we have already rejected. *Perez* is not distinguishable on the basis Steven suggests.

_____
BRUINIERS, J.

WE CONCUR:

_____
SIMONS, Acting P. J.

_____
NEEDHAM, J.